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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

PERRY BLAIR,

Defendant and Appellant.

B206514

(Los Angeles County
Super. Ct. No. LA050172)

APPEAL from a judgment of the Superior Court of Los Angeles County.

Darlene E. Schempp, Judge. Affirmed.

Waldemar D. Halka, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Paul M. Roadarmel, Jr., and Stephanie A. Miyoshi, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Perry Blair appeals from his conviction of first degree murder.¹ His principal contentions are: (1) uncorroborated accomplice testimony was used to convict him; (2) the trial court failed to give certain homicide instructions sua sponte or his attorney was ineffective for not requesting them; and (3) he was entitled to instructions on voluntary intoxication. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. The People's Case

Viewed in accordance with the usual rules on appeal (*People v. Kraft* (2000) 23 Cal.4th 978, 1053), the evidence established that in June 2005, 19-year-old Selina Pena was in jail on prostitution charges when she met another prostitute, Shantel Standifer; Standifer introduced Pena to her pimp, defendant Blair, and defendant became Pena's pimp, too.² While working, Pena and Standifer stayed in contact with defendant using a cell phone with a walkie-talkie function.

A. Pena's Testimony

Pena testified that at about 3:00 a.m. on June 14, 2005, defendant dropped off Pena and Standifer near the intersection of Sepulveda and Valerio in the San Fernando Valley. While the women waited for clients, defendant looked after them from inside the car parked across the street. Soon thereafter, a man named Francisco Vigil, with whom

¹ The jury convicted defendant of first degree murder and found true gun use and great bodily injury enhancements. He was sentenced to 25 years to life for the murder, plus 25 years to life for discharge of a firearm causing great bodily injury (Pen. Code, § 12022.53, subd. (d)); enhancements for personal firearm use and personally discharging a firearm (Pen. Code, § 12022.53, subds. (b), (c)) were stayed.

All future undesignated statutory references are to the Penal Code.

² Standifer testified that, although defendant provided her protection when she worked as a prostitute and she split her money with him, defendant was not her pimp. He was, however, the father of her child and for that reason she had feelings for him.

Pena was familiar, rode up on a bicycle; eventually he started harassing the two women. Pena signaled defendant to pick them up but by the time defendant arrived, Vigil had left.

Pena got into the front passenger seat of defendant's car and told him what had happened. Defendant instructed Pena to take over the driving, explaining that he needed to get his "heat," which Pena understood to mean his gun. Until that moment, Pena did not know defendant had a gun. From the driver's seat, Pena saw defendant go into the back seat and pull a little gray bag out of the center console. At defendant's command, Pena drove back to pick up Standifer but after Pena ran a red light, defendant took over the driving and Pena moved back into the passenger seat. When they got to Standifer, she was crying hysterically. Standifer first sat in the back seat, but then defendant told her to drive so she switched places with him; Pena remained in the front passenger seat. Defendant was holding a gun when he told Standifer to look for Vigil.

As Standifer drove around, Pena became more and more apprehensive about what was going to happen. About five minutes later, they saw Vigil. Defendant said, "Drive slow. I am going to pop this guy." As they came up behind Vigil on his bicycle, Standifer slowed down. Pena recalled that as they drove past Vigil, he "was laughing . . . [h]e was doing a lot of hand gestures. And he was just riding his bike as fast as he could." Vigil appeared to have a gun. Defendant instructed Standifer to slow down so that he could jump out of the car and shoot Vigil. At defendant's command, Standifer stopped in the middle of the street and defendant, still holding the gun, got out of the car. As Vigil rode up, Pena yelled to Standifer, "Duck, duck," because she was afraid Vigil might have a gun. Pena heard a single gunshot but was too afraid to look. She heard defendant say, "Did I get him?" and Standifer reply, "Yeah, Dog, he is down." Standifer drove away. Defendant said, "Man, I didn't want to do that. Forgive me, God."

After Standifer drove around for a few minutes, defendant instructed her to return to the scene of the shooting. There, Pena saw police gathered. Standifer next drove to defendant's home. After changing clothes, defendant returned to the car and threw the clothes he had been wearing into a trash bin at a fast food restaurant. Standifer next drove to Mulholland Drive; she stopped the car near a ditch, defendant got out and tossed

away the gun, which was wrapped in a gray beanie.³ When defendant and Standifer dropped Pena off at the hotel where she was staying, defendant cautioned her not to tell anyone about the shooting. A few days later, Pena was arrested for prostitution. While she was in custody, defendant and Standifer went to the State of Washington. Later, with defendant's guidance, Pena obtained false identification and joined the others. While in Washington, she was arrested for forging a check. Pena went alone to Utah for a few weeks then joined defendant and Standifer in Indiana. Defendant kept them moving every few weeks.

By September 2005, Pena had grown weary of being a prostitute and of being on the run. She contacted the Los Angeles Police Department which arranged for her return to California. On the flight back, she told police what had happened the night Vigil was killed. Pena was never charged in connection with Vigil's murder, and the police promised to help her with the outstanding Washington forgery case.

B. Standifer's Testimony

Standifer's recollection of the events surrounding Vigil's murder was similar, but not identical, to Pena's. In Standifer's version, defendant was the father of her baby, not her pimp. Standifer recalled that Pena, not Standifer, was driving at the time of the shooting; Standifer took over driving after the shooting. Standifer did not know defendant had a gun that night, and could not recall ever seeing one in defendant's hand. Just before the shooting, Standifer was aware that defendant got out of the car, but she was looking away and did not see him fire a gun. Standifer could not recall who said what when defendant got back into the car after the shooting. She did not recall defendant changing or throwing away the clothes he had been wearing. She recalled defendant told her to drive to the Sepulveda Pass so that he could discard a gun. At trial, she recanted her post-arrest statement to police that she saw defendant toss away a gun. After the shooting, Standifer understood that they were relocating every few weeks

³ The police searched the area for a weapon, but never found one.

because they were wanted in connection with Vigil's murder. Defendant did not keep Standifer hostage; she was free to do whatever she wanted, and she chose to stay with defendant until she left defendant for another man. In October or November 2005, Standifer was arrested in Rhode Island. She pled guilty to being an accessory after the fact in connection with Vigil's murder.

C. Other Testimony

Rosalind Crawford was also a prostitute; she had declined defendant's offer to work for him. One morning in mid-June 2005, she overheard defendant bragging to several people that he had shot someone the night before and that he was going to have to leave town. On June 27, Crawford was among the working girls the police questioned about Vigil's killing; she told them what she had heard.

About 3:30 or 4:00 a.m. on June 14, 2005, Daniel Ustoa was stopped in his employer's van near where the shooting would later occur, when he noticed Vigil standing at a bus stop gesturing with his arms, apparently talking to himself. Vigil threw a trash can at Ustoa's van. While Ustoa called his employer to report the incident, he saw a man in a gold Lexus drive by slowly. When the Lexus stopped, two women got out. The driver and these two women appeared to argue with Vigil. Eventually, the women walked away, Vigil rode away on his bicycle and the man in the Lexus drove away. Ustoa never saw the Lexus or the man on the bicycle again. When Ustoa returned to the site to make a report of the trashcan incident, he told one of the police officers what he had seen. From a photographic lineup, Ustoa subsequently identified Pena as one of the two women.

2. *Defense Case*

Defendant testified that in June 2005 he worked as a telecommunication installer and, in his off hours, as a pimp on behalf of his girlfriend, Standifer. At Pena's request, he became her pimp in early June. At about 8:30 p.m. on June 13, Standifer drove defendant to pick up Pena, then drove the three of them to Pasadena, where the two

women worked for a few hours. At about midnight, Standifer drove them to Orange County where the women worked a few more hours. They left Orange County at about 3:00 a.m. on June 14 and Standifer drove them to Sepulveda and Valerio. All the while, defendant had supplied himself, Standifer, and Pena with alcohol and marijuana; after the women left to work, he fell asleep in the car. He was awakened by the sound from his walkie-talkie of both women screaming. Defendant heard Pena say, "He has got a gun. He has got a gun. Help us. He has got a gun." Looking out the window, defendant saw Vigil with his hand in his pocket as if he had a gun; Pena and Standifer were running away from Vigil in opposite directions. Driving to a nearby bus stop, defendant jumped out of the car; Pena jumped into the driver's seat but, when Standifer's access to the car door was blocked by the bus stop, Standifer ran away. Meanwhile, Vigil ran toward defendant with his hand in his jacket pocket; defendant thought Vigil, who was dressed like a gang member, was holding a gun. Vigil then turned his attention to Standifer. When Vigil ran after Standifer, defendant jumped into the back seat and instructed Pena to pick up Standifer. As they were driving, defendant asked Pena if Vigil had a gun; Pena said that he did and explained that Vigil was demanding \$200 in "rent."⁴

When Pena and defendant caught up with Standifer, Vigil was about 30 or 40 feet away and running after her. Pena moved into the front passenger seat, defendant placed Standifer in the driver's seat, and defendant got into the back seat. Defendant instructed Standifer to drive around looking for Vigil because, if Vigil was gone, the two women could continue working. When defendant asked Standifer what happened, she did not answer. This made defendant angry, so he smoked some more marijuana and drank some more alcohol. Eventually, defendant saw Vigil throwing trash cans at a car and a van. Defendant said, "He is going to end up getting his ass whipped. He better have a pistol because he is going to get his ass whipped. Somebody is going to whip his ass." After

⁴ Defendant understood "rent" was money to be paid to the gang that claims the territory in which a prostitute is working in exchange for security. A police witness testified that Vigil was not a known gang member and no gang claimed the territory in which the killing occurred.

they passed Vigil, defendant instructed Standifer to take their usual route home from that area. When Pena turned toward the back seat to light a marijuana cigarette in defendant's hand, she announced that Vigil was coming up behind them. Defendant turned around and saw Vigil on his bicycle, catching up with their car. Defendant instructed Standifer to stop. Although he believed Vigil had a gun, defendant nevertheless got out of the car with the intention of giving Vigil the "rent" money so that Standifer and Pena could continue working in the area. But as Vigil rode toward defendant, defendant could see that Vigil was aiming a small, black gun at defendant. When Vigil was close enough, defendant grabbed Vigil's wrist and bent it back so as to point the gun away. The gun fired as defendant was trying to yank it out of Vigil's hand. Panicked, defendant got into the car, put the gun underneath the front passenger seat and said a prayer: "God, forgive me . . . I didn't mean to do that. It was an accident."

Defendant did not immediately call the police because he did not think they would believe him. Instead, he directed Standifer to drive to his apartment building. His testimony generally confirmed Pena's account of discarding his old clothes and the gun. The next day, defendant drove Standifer and Pena to work. He denied being in a parking lot or telling anyone about the shooting.

DISCUSSION

1. The Jury Should Have Been Instructed on the Principles Governing Accomplice Testimony, But the Error Was Harmless

Defendant contends the trial court prejudicially erred in failing sua sponte to instruct on the principles governing accomplice testimony.⁵ He argues that the evidence established that Pena and Standifer were accomplices as a matter of law; alternatively, there was sufficient evidence to allow the jury to determine whether they were accomplices. Either way, the jury should have been told the testimony needed

⁵ See generally CALJIC Nos. 3.10, 3.11, 3.12, 3.13, 3.14, 3.16, 3.18, and 3.19 (Fall ed. 2007-2008); see also Judicial Council of California Criminal Jury Instructions (2007-2008) CALCRIM Nos. 334, 335.

corroboration. We agree that there was evidence from which it could reasonably be inferred that either Pena or Standifer, or both, were accomplices, but conclude that the failure to instruct on accomplice testimony was harmless because the testimony was legally corroborated.

When there is evidence that a witness is an accomplice as defined by section 1111, the trial court must sua sponte instruct the jury on relevant principles, including the need for corroboration. (*People v. Tobias* (2001) 25 Cal.4th 327, 331.) An accomplice is a person liable for prosecution for the same offense as the defendant. (*People v. Boyer* (2006) 38 Cal.4th 412, 466-467 (*Boyer*).) An accomplice must act “ ‘with knowledge of the criminal purpose of the perpetrator *and* with an intent or purpose either of committing, or of encouraging, or facilitating commission of, the offense.” ’ [Citation.]” (*People v. DeJesus* (1995) 38 Cal.App.4th 1, 23 (*DeJesus*); see also *Boyer, supra*, 38 Cal.4th at p. 467.) “It is not enough that the person charged as an aider and abettor give assistance with *knowledge* of the perpetrator’s criminal purpose.” (*People v. Balderas* (1985) 41 Cal.3d 144, 194 (*Balderas*).)

Whether a witness was an accomplice is generally a question of fact. (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 103.) The defendant bears the burden of proving accomplice status by a preponderance of the evidence. (*People v. Frye* (1998) 18 Cal.4th 894, 967.) A trial court can decide the question as a matter of law when the facts are clear and undisputed. (*People v. Williams* (1997) 16 Cal.4th 635, 679.) Otherwise, the question is to be submitted to the jury. (*People v. Hoover* (1974) 12 Cal.3d 875, 880.)

In *DeJesus*, the court found the issue was for the jury to decide. It reasoned that the requisite guilty knowledge and intent could be inferred from the evidence that, although the witness refused to participate in the killing (i.e., pull the trigger), the witness was aware of the plan to kill the victim, knew one codefendant had procured the other codefendant to perpetrate the killing, and the witness promised to help move the body. (*DeJesus, supra*, 38 Cal.App.4th at pp. 22-25.) By contrast, in *Balderas*, our Supreme Court found there was not sufficient evidence to find the witness was an accomplice

where the evidence showed the witness intended to steal money from parked cars with the defendant, but left when the defendant stated he was going to commit a robbery, even though he later assisted the defendant in disposing of evidence. (*Balderas, supra*, 41 Cal.3d 144; see also *People v. Sully* (1991) 53 Cal.3d 1195, 1227-1228 [witness not an accomplice when she only drove murder victim to warehouse so that defendant could purchase cocaine from victim, then left but later returned and was present when victim was murdered]; *People v. Snyder* (2003) 112 Cal.App.4th 1200, 1220-1221 [witness not an accomplice where evidence showed he had advance knowledge that defendants intended to rob drug dealer, but his participation consisted solely of giving the defendants a ride to public transportation before encounter].)

The erroneous failure to give accomplice instructions does not require reversal where the witness's testimony is in fact sufficiently corroborated. (*Boyer, supra*, 38 Cal.4th at p. 467.) Corroborative evidence “ ‘ ‘ ‘may be slight and entitled to little consideration when standing alone. [Citations.]’ ” [Citations.] . . . “ ‘must tend to implicate the defendant and therefore must relate to some act or fact which is an element of the crime but it is not necessary that [such] evidence be sufficient in itself to establish every element of the offense charged.’ [Citation.]” ’ [Citation.]” (*Ibid.*)

Here, if the jury believed Pena's version of events, there was evidence from which it could infer that Standifer was an accomplice. Standifer's knowledge of defendant's criminal purpose and her intent to facilitate defendant's commission of the offense can be inferred from the evidence that defendant was armed when Standifer complied with his instructions to drive around looking for Vigil and to slow down so that he could shoot Vigil. There was no evidence that defendant coerced Standifer's aid with a threat of imminent violence. (*People v. Killman* (1975) 51 Cal.App.3d 951, 956-957.) Likewise, if the jury believed Standifer's version of events (i.e., that Pena was the driver) the same evidence was susceptible to a reasonable inference that Pena was an accomplice. As with Standifer, there was no evidence that Pena was coerced into aiding defendant. The jury could also have believed parts of each witnesses' testimony and hence concluded both were accomplices.

Since there was evidence tending to prove that either or both Pena and Standifer were accomplices, the trial court had a sua sponte duty to instruct on accomplice testimony. We conclude, however, the trial court's failure was harmless because defendant's own testimony corroborated Standifer and Pena. Defendant testified he was at the scene of the shooting with Pena and Standifer; the women screamed that Vigil had a gun and defendant saw Vigil had a gun; defendant left the scene then returned to confront and shoot Vigil. Defendant acknowledged the essential facts showing motive: Vigil was harassing his prostitutes and was a gang member demanding protection money. That defendant claimed the killing was an accident, or even that he acted in self-defense, did not distract from the fact that his testimony legally corroborated Pena's account of the killing. (See *People v. Vu* (2006) 143 Cal.App.4th 1009, 1021 [corroborating evidence, including the defendant's own testimony, tended to show motive and opportunity].) No reasonable jury could have found the accomplice testimony was uncorroborated.

2. *The Trial Court Properly Denied Defendant's Section 1118.1 Motion*

Defendant contends the trial court should have granted his section 1118.1 motion made at the close of the prosecution's case-in-chief. He argues that at the time he made the motion, the only evidence connecting him to the killing was the uncorroborated testimony of Pena and Standifer. We disagree.

“ ‘The purpose of a motion under section 1118.1 is to weed out as soon as possible those few instances in which the prosecution fails to make even a prima facie case.’ [Citations.] The question ‘is simply whether the prosecution has presented sufficient evidence to present the matter to the jury for its determination.’ [Citation.] The sufficiency of the evidence is tested at the point the motion is made. [Citations.]” (*People v. Stevens* (2007) 41 Cal.4th 182, 211.) Where the only evidence connecting the defendant to the crime at the time of a section 1118.1 motion to dismiss is the uncorroborated confession of an accomplice, there is insufficient evidence to overcome the motion. (*People v. Belton* (1979) 23 Cal.3d 516, 526-527 (*Belton*).)

Here, the trial court properly denied defendant's section 1118.1 motion because at the close of the prosecution's case-in-chief there was sufficient corroborative evidence of Standifer's and Pena's accounts. First, each offered accounts in which she was not an accomplice at all. The jury could have believed either one of them and have found defendant guilty based on the evidence of a nonaccomplice. That Pena and Standifer offered accounts in which they were not accomplices distinguishes this case from *Belton*, *supra*, 23 Cal.3d 516, in which the accomplice-witness did not offer any version of events in which he was not an accomplice. The testimony of witnesses Crawford and Ustoa also tended to connect defendant to the killing and was thus corroborative of Pena's and Standifer's testimony.

3. *Instructional Errors*

Defendant contends he was denied due process because the trial court did not sua sponte give CALJIC Nos. 8.50, 8.72, and 8.73 on degrees of homicide. The People counter that, read as a whole, the instructions given adequately informed the jury of the applicable law. We agree with the People.

Instructions should be interpreted to support the judgment rather than defeat it if they are reasonably susceptible to such interpretation. (*People v. Ramos* (2008) 163 Cal.App.4th 1082, 1088.) In a noncapital case, error in failing sua sponte to instruct, or to instruct fully, on all lesser included offenses and theories thereof which are supported by the evidence are reviewed for prejudice under *People v. Watson* (1956) 46 Cal.2d 818, 836. A conviction of the charged offense may be reversed for such error only if it appears reasonably probable the defendant would have obtained a more favorable result. (*People v. Lasko* (2000) 23 Cal.4th 101, 111.) In making this determination, we consider the arguments that counsel made during trial. (*People v. Young* (2005) 34 Cal.4th 1149, 1202.)

With these principles of appellate review in mind, we address defendant's contentions.

A. CALJIC No. 8.73

CALJIC No. 8.73 reads: “If the evidence establishes that there was provocation which played a part in inducing an unlawful killing of a human being, but the provocation was not sufficient to reduce the homicide to manslaughter, you should consider the provocation for the bearing it may have on whether the defendant killed with or without deliberation and premeditation.” The trial court is not obligated to give CALJIC No. 8.73 sua sponte. (*People v. Middleton* (1997) 52 Cal.App.4th 19, 28-33, disapproved of on another point in *People v. Gonzalez* (2003) 31 Cal.4th 745, 752, fn. 3.)⁶

B. CALJIC No. 8.72

CALJIC No. 8.72 reads: “If you are convinced beyond a reasonable doubt and unanimously agree that the killing was unlawful, but you unanimously agree that you have a reasonable doubt whether the crime is murder or manslaughter, you must give the defendant the benefit of that doubt and find it to be manslaughter rather than murder.”

In *People v. Dewberry* (1959) 51 Cal.2d 548, 555 (*Dewberry*), our Supreme Court held that “when the evidence is sufficient to support a finding of guilt of both the offense charged and a lesser included offense, the jury must be instructed that if they entertain a reasonable doubt as to which offense has been committed, they must find the defendant guilty only of the lesser offense. [Citations.]”

However, in *People v. Musselwhite* (1998) 17 Cal.4th 1216 (*Musselwhite*), the court explained that it is sufficient if the trial court gives several generally applicable instructions governing use of the reasonable doubt standard, each of which requires the

⁶ Even if the instruction should have been given, the error would have been harmless in light of other instructions on the subject. The trial court instructed on the elements of murder (CALJIC No. 8.10); the definition of express and implied malice (CALJIC No. 8.11); the elements of deliberate and premeditated murder (CALJIC No. 8.20); and what to do in the event of a reasonable doubt as between first and second degree murder (CALJIC No. 8.71). The jury was also instructed on the definition of manslaughter (CALJIC No. 8.37); the elements of voluntary manslaughter (CALJIC No. 8.40); that heat of passion and provocation reduce a murder to manslaughter (CALJIC No. 8.42); and no specific emotion constitutes heat of passion (CALJIC No. 8.44).

jury to find defendant guilty of the lesser included or related offense or lesser degree where it has a reasonable doubt as to any greater included or related offenses or degrees. In *Musselwhite*, the trial court gave the jury so-called “benefit of the doubt” instructions as to first and second degree murder, and as to murder and manslaughter, but failed to give it as to attempted murder and assault with a deadly weapon. The jury was, however, instructed: “ ‘[I]f the evidence as to any such specific intent or mental state is susceptible of two reasonable interpretations, one of which points to the existence of the specific intent or mental state and the other to the absence of the specific intent or mental state, you must adopt that interpretation which points to the absence of the specific intent or mental state.’ ” (*Id.* at pp. 1262-1263, see also CALJIC No. 2.02.) Our Supreme Court held that the specific intent instruction “fulfilled the same function” as the instruction proffered by the defendant in *Dewberry*, *supra*, and erroneously refused by the trial court in that case.

Here, the jury was given:

- CALJIC No. 2.90, explaining the presumption of innocence and definition of reasonable doubt;
- CALJIC No. 8.71, explaining that if they unanimously agreed that the defendant committed murder, but had a reasonable doubt as to whether it was first or second degree murder, they must give the defendant the benefit of the doubt and find him guilty of second degree murder;
- CALJIC No. 5.15, explaining the prosecution’s burden to prove beyond a reasonable doubt that the killing was unlawful; and
- CALJIC No. 17.10, explaining that if not satisfied beyond a reasonable doubt that the defendant was guilty of murder, they could convict him of a lesser crime if convinced beyond a reasonable doubt that he was guilty of that lesser crime, and that voluntary manslaughter is a lesser crime to murder.

Under the reasoning of the court in *Musselwhite*, *supra*, 17 Cal.4th at page 1248, considered as whole, these instructions were adequate. (See also *People v. Hinton* (2006) 37 Cal.4th 839, 883.)

C. CALJIC No. 8.50

In relevant part, CALJIC No. 8.50 reads:

“The distinction between murder . . . and manslaughter is that murder . . . requires malice while manslaughter does not. [¶] When the act causing the death, though unlawful, is done [in the heat of passion or is excited by a sudden quarrel that amounts to adequate provocation,] [or] [in the actual but unreasonable belief in the necessity to defend against imminent peril to life or great bodily injury,] the offense is manslaughter. In that case, even if an intent to kill exists, the law is that malice, which is an essential element of murder, is absent. [¶] To establish that a killing is murder . . . and not manslaughter, the burden is on the People to prove beyond a reasonable doubt each of the elements of murder and that the act which caused the death was not done [in the heat of passion or upon a sudden quarrel] [or] [in the actual, even though unreasonable, belief in the necessity to defend against imminent peril to life or great bodily injury].”

In *Mullaney v. Wilbur* (1975) 421 U.S. 684, 704, the Supreme Court held that, when the issue is properly presented in a murder case, the due process clause of the United States Constitution requires the prosecution to prove the absence of heat of passion. (See also *People v. Najera* (2006) 138 Cal.App.4th 212, 227 (*Najera*); *People v. Rios* (2000) 23 Cal.4th 450, 462.) CALJIC No. 8.50 so provides. “In such cases, if the fact finder determines the killing was intentional and unlawful, but is not persuaded beyond reasonable doubt that provocation (or imperfect self-defense) was absent, it should acquit the defendant of murder and convict him of voluntary manslaughter.” (*People v. Rios*, at p. 462.)

Here, having found sufficient evidence to instruct on manslaughter as a lesser included offense of murder, the trial court had a sua sponte duty to give CALJIC No. 8.50. (*Najera*, *supra*, 138 Cal.App.4th at p. 227.) However, we find the error harmless, as there is no possibility that the jury misinterpreted the given instructions or was confused about the prosecution having the burden of proving that defendant did not

act in the heat of passion or in unreasonable self-defense. The jury was instructed that the prosecution had the burden of proving appellant guilty beyond a reasonable doubt and of proving malice for murder. It was also instructed that malice is absent if the killing occurred in the heat of passion or in the actual but unreasonable belief of self-defense. During argument, the prosecutor reiterated that the burden of proof was on the prosecution and that the defense “does not have to do anything.” Defense counsel reminded the jury that the prosecution had the burden of proof, and argued that it had failed to prove malice. On this record, we fail to see how the jury could have concluded the prosecution did not have the burden of proof; accordingly, any error in not giving CALJIC No. 8.50 was harmless.

4. *Defendant Did Not Receive Ineffective Assistance of Counsel*

Also without merit is defendant’s contention that he received ineffective assistance of counsel because defense counsel did not request CALJIC No. 8.73 on provocation reducing murder from first degree to second.

To prevail on a claim of ineffective assistance of counsel, a criminal defendant must show that (1) counsel’s performance fell beneath an objective standard of reasonableness; and (2) but for counsel’s performance, a different result was reasonably probable. (*People v. Lewis* (1990) 50 Cal.3d 262, 288.)

Here, defendant has not shown a reasonable probability of a different result if defense counsel had requested, and the jury had been given, CALJIC No. 8.73. The evidence of premeditation and deliberation was strong: defendant armed himself and then drove around looking for Vigil with the stated intention of shooting him; after killing Vigil, defendant bragged about the shooting. By contrast, the evidence of provocation was weak: Vigil was under the influence, behaving erratically and verbally harassed the prostitutes working for defendant; although defendant maintained that Vigil was armed and aimed his gun at defendant, neither Pena nor Standifer actually saw Vigil in possession of a weapon; instead of immediately calling the police and reporting that he shot Vigil by accident or in self-defense, defendant discarded his clothes and gun in a

public trash container; the next day, he bragged about the shooting to others and then fled the state. Considering the strength of the evidence against defendant and the instructions actually given (see fn. 6, *ante*), defendant suffered no prejudice by the absence of CALJIC No. 8.73.

5. *The Evidence Was Insufficient to Warrant an Instruction on Voluntary Intoxication*

Defendant contends the trial court should have given CALJIC Nos. 4.21 and 4.22, dealing with the effect of voluntary intoxication on a defendant's mental state. We disagree. Evidence that defendant had been drinking or using drugs without evidence of intoxication does not support the giving of intoxication instructions. (*People v. Sanchez* (1982) 131 Cal.App.3d 718, 735.) Here, although defendant apparently had smoked marijuana and drunk alcohol at times that night, there was no evidence he was intoxicated.⁷

DISPOSITION

The judgment is affirmed.

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RUBIN, ACTING P. J.

WE CONCUR:

FLIER, J.

BIGELOW, J.

⁷ Defendant contends that even if the errors complained of were individually harmless, they were cumulatively prejudicial. The two errors, which we have found harmless cumulatively, were not prejudicial in light of the totality of the instructions given by the trial court. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1148.)